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No. 86-959

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

KELLY FALOONA and BRANDON FALOONA,
by their next friend, LINDA FREDRICKSON,

Petitioners,

vs.

HUSTLER MAGAZINE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit correctly determined that under Texas law *Hustler's* republication of petitioners' photographs that appeared in books that were reviewed and excerpted by *Hustler* did not publicly disclose private facts and did not misappropriate petitioners' likenesses for commercial advantage.

2. Whether the Court of Appeals for the Fifth Circuit correctly distinguished its own decisions in *Wood v. Hustler* and *Braun v. Flynt* and the Seventh Circuit's decision in *Douglass v. Hustler* in determining that under Texas law *Hustler's* publication of petitioners' photographs in connection with the publication of a book review and book excerpts did not place the petitioners in a false light.

3. Whether the Court of Appeals for the Fifth Circuit correctly determined that under California law a parent could consent to non-pornographic nude photographs of her children without judicial approval.

PARTIES TO THE PROCEEDING BELOW

Plaintiffs/Petitioners:	Kelly Faloona Brandon Faloona by their next friend, Linda Fredrickson
Defendant/Respondent:	Hustler Magazine, Inc.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding Below ii

Table of Contents iii

Table of Authorities v

Reference to Opinions 1

Jurisdiction 2

Statement of the Case 2

Reasons for Denying the Writ:

I. The questions presented by the Petition for Writ of Certiorari solely concern interpretations of the common law and statutory law of California and Texas and are not certworthy. 2

II. The Court of Appeals correctly determined that under Texas law *Hustler's* inclusion of Petitioners' nude photographs in connection with its review and its excerpting of the books in which the photographs appeared did not publicly disclose private facts and did not misappropriate Petitioners' likenesses for commercial advantage 5

A. The Court of Appeals correctly held that *Hustler's* publication of the same nude photographs that were already in the public domain by publication of *The Sex Atlas* and *Meditations on the Gift of Sexuality* did not publicly disclose private facts 5

B. The Court of Appeals correctly held that publication of Petitioners' photographs in connection with the book review of *Meditations* and the excerpt from *The Sex Atlas* was not a commercial appropriation 6

TABLE OF CONTENTS—Continued

Page

III. The Court of Appeals correctly determined that under Texas law *Hustler's* publication of Petitioners' photographs as part of its book review of *Meditations* and the excerpt from *The Sex Atlas* did not place Petitioners in a false light 7

IV. The Court of Appeals correctly held that the parental consent to Petitioners' nude photographs without court approval was valid and effective under California law 8

Conclusion 10

TABLE OF AUTHORITIES

Page

SUPREME COURT OF THE UNITED STATES:

Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970) 9

New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) 3

Western and Southern Life Ins. Co. v. State Board of Equalization of California, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) 9

UNITED STATES COURTS OF APPEAL:

Braun v. Flynt, 726 F.2d 245 (5th Cir.), *reh'g en banc denied*, 731 F.2d 1205, *cert. denied sub nom. Chic Magazine, Inc. v. Braun*, 469 U.S. 883, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984) 8

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1489, 89 L.Ed.2d 892 (1986) 4, 7, 8

Wood v. Hustler Magazine, Inc., 736 F.2d 1084 (5th Cir. 1984), *cert. denied*, 469 U.S. 1107, 105 S.Ct. 783, 83 L.Ed.2d 777 (1985) 8

UNITED STATES DISTRICT COURTS:

Ann-Margaret v. High Society Magazine, Inc., 498 F. Supp. 401 (S.D.N.Y. 1980) 7

STATE CASES:

Gill v. Snow, 644 S.W.2d 222 (Tex. App.—Fort Worth 1982, no writ) 5

Goelat v. Confidential, 171 N.Y.S.2d 223 (N.Y. Supp. App. Div. 1958) 7

TABLE OF AUTHORITIES—Continued

	Page
Handelman v. Hustler Magazine, Inc., 469 F.Supp. 1053 (S.D.N.Y. 1979)	7
Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976)	5, 6
Kimbrough v. Coca Cola, 521 S.W.2d 719 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.)	6
Molony v. Boy Comics Publishers, Inc., 98 N.Y.S. 2d 119 (N.Y. Supp. App. Div. 1950)	7
National Bank of Commerce v. Shaklee Corp., 503 F.Supp. 533 (W.D. Tex. 1980)	6
STATUTES:	
Cal. Civ. Code § 3344(a)	8
RULES:	
Rule 17, Supreme Court Rules	3
OTHER AUTHORITIES:	
Restatement (Second) of Torts § 652D, comment c	5, 6
Restatement (Second) of Torts § 652C, comment d	6
Attorney General's Commission on Pornography—Final Report 1986	9

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RESPONDENT'S BRIEF IN OPPOSITION

REFERENCE TO OPINIONS

The opinion of the United States District Court of the Northern District of Texas is reported at 607 F.Supp. 1341 and is reproduced at Appendix 2 in the petition already filed with the Court by Petitioners.

The opinion of the United States Court of Appeals for the Fifth Circuit, dated September 15, 1986, is reported

at 799 F.2d 1000, and the original slip opinion is reproduced at Appendix 47 in the petition on file with the Court by Petitioners.

JURISDICTION

The Judgment for the Court of Appeals for the Fifth Circuit was entered on September 15, 1986, and Rehearing En Banc was denied on October 14, 1986.

Petitioners allege that jurisdiction of this court is based upon 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

The opinions of the district court and the court of appeals correctly state the relevant facts.

REASONS FOR DENYING THE WRIT

I. The questions presented by the Petition for Writ of Certiorari solely concern interpretations of the common law and statutory law of California and Texas and are not certworthy.

The issues presented to this Court and those decided by the district court and the Court of Appeals in this diversity action solely concern matters of state law. As such, Petitioners have not presented any question worthy of review on certiorari. None of the considerations listed

in Rule 17, Supreme Court Rules, governing review on certiorari are present in this case.

The Court of Appeals did not decide a federal question in conflict with an applicable decision of this Court, and, in fact, did not decide any question of federal law. The issue presented to and decided by both the district court and the Court of Appeals was whether Petitioners made out a cause of action under the Texas common law of privacy. The only defensive issue considered by the Court of Appeals was the validity, under California statutory and common law, of the releases executed by Petitioners' mother. The Court of Appeals expressly declined to decide any federal constitutional issues. 799 F.2d 1000, 1006, n. 2 (Appendix at 60).

The Petition appears to allege some sort of federal right arising out of this Court's decision in *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982). In *Ferber*, this Court held that pornographic works that visually depict specified sexual conduct by children were outside the protection of the First Amendment and could be regulated by the states. *Ferber*, 458 U.S. at 764. The *Ferber* decision did not *create* any substantive rights, and the First Amendment issues discussed in *Ferber* are not present in this case. Further, both of the courts below expressly found that the photographs at issue in this case are not child pornography. 799 F.2d at 1004, n. 1, Slip Op. at 959 n. 1. (Appendix at 57); 607 F.Supp. at 1344 n. 10 (Appendix at 6-7). No question of federal law is presented by the petition.

The Court of Appeals did not render a decision in conflict with the decisions of another court of appeals on the same matter. Contrary to the assertions in the Peti-

tion for Writ of Certiorari (page 8), the decision of the Fifth Circuit Court of Appeals in this case does not conflict with the decision of the Seventh Circuit in *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied* — U.S. —, 106 S.Ct. 1489, 89 L.Ed.2d 892 (1986). The sole point on which Petitioners assert the existence of a conflict concerns the Courts' review of the "context" in which the offending photographs appear. Both the Seventh Circuit in *Douglass* and the Fifth Circuit below reviewed the "context" of the photographs solely to determine whether, as a matter of state law, the plaintiff had a valid cause of action for false light invasion of privacy by a suggestion that they voluntarily agreed to pose for and appear in *Hustler*. In the case of *Douglass v. Hustler*, a further issue concerned a false implication that Ms. Douglass was a lesbian. Each court reviewed the particular facts presented in the case before it. The Fifth Circuit found in this case that the context did not create a false implication. No conflict concerning the controlling legal issues exists.

The final reason cited in the Petition for granting the writ of certiorari is an alleged "conflict with all American judicial systems" concerning the parental releases for the photographs (page 10). The validity of the releases solely concerns a question of interpretation and application of California statutory and common law. The decision of the Court of Appeals does not conflict with the law of California. To the extent an argument could be made that it does, the conflict would involve only state law matters and would raise no federal concerns.

The Petition for Writ of Certiorari presents no federal issues or issues concerning the Courts of Appeals'

method of reaching its decision. Petitioners merely disagree with the Court of Appeals' assessment of the law of California and Texas and want this Court to interpret or change the law of those states to accommodate their claim. The issues involved in this case are not certworthy and the Petition for Writ of Certiorari should be denied.

II. The Court of Appeals correctly determined that under Texas law Hustler's inclusion of Petitioners' nude photographs in connection with its review and its excerpting of the books in which the photographs appeared did not publicly disclose private facts and did not misappropriate Petitioners' likenesses for commercial advantage.

A. The Court of Appeals correctly held that Hustler's publication of the same nude photographs that were already in the public domain by publication of The Sex Atlas and Meditations on the Gift of Sexuality did not publicly disclose private facts.

The Court of Appeals correctly held that *Hustler* did not invade Petitioners' privacy by publicly disclosing private facts. The undisputed facts established that the nude photographs that appeared in *Hustler's* book review of *Meditations* and its excerpts of *The Sex Atlas* were already widely published elsewhere. Under the common law of Texas *Hustler* could be liable only for publishing intimate and embarrassing *private* facts; further publicity to matters already public does not create liability. *Industrial Foundation of the South v. Texas Industrial Accident Board,* 540 S.W.2d 668, 682 (Tex. 1976); *Gill v. Snow,* 644 S.W.2d 222, 223-24 (Tex. App.—Fort Worth 1982, no writ). *See also Restatement (Second) of Torts* § 652D, comment c.

B. The Court of Appeals correctly held that publication of Petitioners' photographs in connection with the book review of Meditations and the excerpt from The Sex Atlas was not a commercial appropriation.

The undisputed facts showed that *Hustler's* use of these photographs did not create a cause of action for commercial misappropriation under Texas law. They did not appear in any advertisements or promotional pieces for the magazine. Petitioners were not identified or referred to. Under Texas law, which has adopted in large part the *Restatement* view of the law of privacy, *See, e.g., Industrial Foundation of the South v. Texas Industrial Accident Board,* 540 S.W.2d 668, 682 (Tex. 1976), the mere publication of a person's likeness in a commercial magazine does not create a cause of action for misappropriation. *Restatement (Second) of Torts* § 652C, comment d. The publisher must have capitalized upon the likeness of that person in a direct connection with commercial sponsorship or paid advertising so that the use is for advertising and solicitation. *See National Bank of Commerce v. Shaklee Corp.,* 503 F.Supp. 533, 540 (W.D. Tex. 1980); *Kimbrough v. Coca Cola,* 521 S.W.2d 719 (Tex. Civ. App.—Eastland 1975, writ ref'd n.r.e.). These photographs appeared only as part of *Hustler's* legitimate publication of a book review of *Meditations on the Gift of Sexuality* and an excerpt from *The Sex Atlas,* not as advertisements. The Court of Appeals correctly determined that no cause of action existed under Texas law.

III. The Court of Appeals corectly determined that under Texas law Hustler's publication of Petitioners' photographs as part of its book review of Meditations and the excerpt from The Sex Atlas did not place Petitioners in a false light.

The Court of Appeals carefully considered and rejected Petitioners' claim that the publication of their nude photographs in *Hustler* insinuated that they were willing to appear naked in *Hustler* and that they endorsed and supported the magazine. Considering the photographs in context, the Court of Appeals rightly found that no reasonable person could construe the appearance of the photographs in *Hustler* as an agreement with or endorsement of *Hustler*.[1] The photographs were plainly reproductions from the books reviewed or excerpted.

Petitioners' suggestion that the Court of Appeals' decision conflicts with its own earlier decisions and the Seventh Circuit's decision in *Douglass v. Hustler*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1489, 89 L.Ed. 892 (1986) ignores the Fifth Circuit's care in distinguishing those decisions in its opinion affirming

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[1] Hustler Magazine, Inc. strongly objects to the legal theory suggested by the Fifth Circuit and the Seventh Circuit in *Douglass v. Hustler*, 769 F.2d 1128 (7th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 1489, 89 L.Ed. 892 (1986) under which otherwise unobjectionable and non-actionable photographs become actionable because of the type of magazine in which they appear. This principle is contrary to a long line of cases that have held that no defamation or invasion of privacy can be imputed from the nature of and unrelated material in a publication. *See Molony v. Boy Comics Publishers, Inc.*, 98 N.Y.S.2d 119 (N.Y. Supp. App. Div. 1950); *Goelat v. Confidential*, 171 N.Y.S.2d 223 N.Y. Supp. App. Div. 1958); *Handelman v. Hustler Magazine, Inc.*, 469 F.Supp. 1053 (S.D.N.Y. 1979); *Ann-Margaret v. High Society Magazine, Inc.*, 498 F.Supp. 401 (S.D.N.Y. 1980).

the district court's summary judgment. The Fifth Circuit drew a sharp contrast between the context in which these photographs appeared and the context in *Douglass, supra; Braun v. Flynt,* 726 F.2d 245 (5th Cir.), *reh'g en banc denied,* 731 F.2d 1205, *cert. denied sub nom. Chic Magazine, Inc. v. Braun,* 469 U.S. 883, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984); and *Wood v. Hustler Magazine, Inc.,* 736 F.2d 1084 (5th Cir. 1984), *cert. denied,* 469 U.S. 1107, 105 S.Ct. 783, 83 L.Ed.2d 777 (1985). In those cases the Courts found that the context in which the photographs were published suggested that the persons depicted voluntarily agreed to appear in the magazines. The Court of Appeals correctly found that no reasonable jury could find such a suggestion in this case.

IV. The Court of Appeals correctly held that the parental consent to Petitioners' nude photographs without court approval was valid and effective under California law.

The Court of Appeals rightly found that the Petitioners' mother's consent to their nude photographs was valid under California law and that California law did not require judicial approval for such photographs. The Court of Appeals could find no California authority requiring judicial approval for the taking or publishing of photographs of children, including non-pornographic nude photographs. The only analogous California authority was California Civil Code § 3344, which specifically *recognizes* parental consent as a defense to a claim of invasion of privacy under that statute, Cal. Civ. Code § 3344(a). The Court of Appeals correctly determined that the common law was the same as § 3344(a).

Petitioners, largely relying on the July 1986 Attorney General's Commission on Pornography—Final Report, 1986, urge this Court to require judicial approval before parents could consent to nude photographs of their children (pornographic or not) and to declare parental consent to nude photographs of children taken without such judicial approval to be against public policy. Under our federal system, however, this is not a matter to be determined and declared *sua sponte* by federal courts. Such issues are left to the determination of the states through their legislation and their common law, and federal courts are not empowered to second guess the wisdom of state economic or social policy. *Western and Southern Life Ins. Co. v. State Board of Equalization of California*, 451 U.S. 648, 670, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981); *Dandridge v. Williams*, 397 U.S. 471, 484-86, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970). In this instance the Court of Appeals found that neither California nor Texas law supported Petitioners' claims.

Petitioners essentially argue that a parent cannot consent to the use of her child's photograph without judicial consent. But common sense and common experience say that parents have the power and authority to authorize use of their children's photographs. Photographs of children playing, children in school, baby contests, and other similar events are photographed and published every day with parental consent and without the benefit of judicial intervention.

The Petitioners ask this Court to use its power to alter this very common and appropriate state of affairs by stripping parents of their authority and requiring par-

ents and publishers alike to rush to the courts with some undefined proceeding in which the court, not the parent, presumes to judge what is in the best interest of the children and society. Not only does this make no sense legally, it goes against our common experience and judgment.

But the Petitioners argue that this case is different as it involves nude photographs and *Hustler* magazine, a sexually oriented magazine, instead of educational sex books like *The Sex Atlas*. This confluence of circumstances does not argue that (1) parents should be shorn by this Court of their authority to decide what is best or at least harmless to their children; (2) this Court should legislate what a parent can and cannot agree to when the state legislature has chosen not to or decided differently; or (3) this Court should deny a publication the right to publish book reviews or excerpts where the unrelated contents of the publication might offend those portrayed in the reviewed or excerpted book.

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CONCLUSION

This Court should deny the Petition for Writ of Certiorari because this case does not raise any federal constitutional issues or matters of nationwide importance subject to the Court's determination here. The Court of Appeals correctly determined and applied the law of California and Texas to this case's particular facts to find

no invasion of privacy by public disclosure of private facts, commercial misappropriation or false light, and found a valid parental consent. This Court should not disturb those holdings.

Respectfully submitted,

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